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10/505,285

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Lionel Breton

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BELL, BOYD & LLOYD LLP  
P.O. Box 1135  
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EXAMINER

BARNHART, LORA ELIZABETH

ART UNIT

PAPER NUMBER

1651

NOTIFICATION DATE

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ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

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***Continuation Sheet for Advisory Action***

The claims being considered after final rejection are those submitted 10/15/07.

No amendments to the claims have been submitted since that time.

*Continuation of Box 11.* The request for reconsideration has been fully considered, but it does NOT place the application in condition for allowance because it fails to overcome the art rejections of record.

Applicant provides arguments that are substantially identical to those presented in the reply considered for the 6/18/08 final rejection. Specifically, applicant alleges that the references are non-analogous art (see after final reply, page 2, and 3/24/08 reply, page 3). Applicant also alleges the presence of evidence of synergy (see after final reply, pages 3-4, and 3/28/08 reply, pages 2 and 4). Applicant alleges that the claims are drawn to a composition for skin photoprotection, so the art does not address the problem with which applicant is concerned (see after final reply, pages 3-4, and 3/28/08 reply, page 3). The examiner's comments in the final rejection therefore apply to the instant reply for the same reasons.

To summarize, **applicant has provided no evidence that the particular amounts of the components are inventive** with respect to photoprotection or any other result. The specification alleges that the instant composition has a synergistic photoprotective effect on skin (see page 4, lines 4-8, and page 9, lines 19-20) but includes no experimental data to show that this is the case. See *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385 (U.S. 2007), which establishes **evidence** of secondary considerations as one manner in which obviousness rejections may be

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overcome; evidence, not just a per se allegation of patentability, is required. There is simply no evidence, either in the specification or provided in a declaration, of the purported photoprotective effect, and given the fact that the art establishes that the amounts of probiotic lactic acid bacteria and yeast are optimizable within pet food compositions, such evidence would be required to establish that the claimed range provides a truly unexpected result. Furthermore, the working examples in the specification are limited to a few formulations that include one of a few strains of *L. acidophilus* (a probiotic lactic acid bacteria) and dried *S. cerevisiae* (a yeast), but the claims do not limit the type of bacteria or yeast. Furthermore, the amounts of microorganisms in the compositions of the working examples are not commensurate in scope with the claimed amounts. Despite lengthy prosecution in this case, applicant has declined to provide evidence sufficient to support the patentability of the claims, instead referring to a few general statements in the specification. This argument is and will continue to be unpersuasive.

Regarding the issue of whether the art is analogous to the claims, the instantly claimed composition, like the compositions of the cited prior art, is a nutritionally complete pet food. Applicant's arguments overlook the fact that the problem allegedly sought to be solved by the instant invention is not the only one that is addressed by the disclosure. All of the cited art is concerned with pet nutrition. Especially given the fact that the instant claims do not refer to photoprotection, this argument is unpersuasive.

/Lora E Barnhart/  
Primary Examiner, Art Unit 1651

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